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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER IN REPLY

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ARGUMENT

In a combined total of 59 pages the briefs submitted on behalf of Respondents argue that no question involved in this case is worthy of review by this Court.

This brief will be limited primarily to Petitioner's reply to the two principal lines of argument pursued, respectively, in Respondents' briefs. The first—that the decision merely involves the application of settled and undisputed

legal principles—is argued in the Board's brief. The second—that it involves no more than an assessment of particular factual considerations—is the main theme of the Union's brief. A third contention—an outgrowth of the first two—that the decision in this case is without importance or widespread significance, will also be briefly treated in this reply.

A. The Novelty of the Questions Here Presented

Refuting the contention of routineness advanced by the Board are the facts that the central condemnation was not of the Company's conduct but of its approach to bargaining,[1] and that the Company's rights under Sections 8(c) and 8(d) of the National Labor Relations Act, as amended ("the Act"), were invaded by a decision which forbade that approach.[2] Indeed, the novelty of the question was admitted, albeit guardedly, in the Board's brief on this Petition in the following language (Bd. Br. 22):[3]

> "The only possibly novel feature of this case involves their application to an employer who, while using such

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[1] As observed in the concurring opinion of Board Member Jenkins (Pet. App. C 12):

> "However, in view of the fact that the majority has gone beyond conduct and indeed concedes that it is not basing its finding of overall bad faith on conduct but rather is basing that finding on an assessment of the Respondent's [GE's] approach to its duty to bargain in good faith, I am constrained to disavow their comments concerning the employer's bargaining technique."

[2] See Petition 12-32.

[3] References to the Board's and Union's briefs in opposition shall sometimes be made, respectively, as follows: Bd. Br. and U. Br.

> tactics, nonetheless did appear willing to enter into an agreement—as long as it was the one it had predetermined." [4]

Despite efforts, particularly in the Union's brief, to obscure the clarity of the questions here presented by references to alleged threats or promises in the communications, the fact is that the restrictions imposed on communications in this case were not directed to alleged threats or promises. They represent an interdiction against a bargaining policy and a communication of it to employees because their combined effect allegedly was to inhibit concessions beyond those contained in an initial offer. No decision of this Court has ever approved so sweeping an arrogation of power by the Board.

B. The Irrelevancy of the Union's Factual Argument

The Union's brief essentially is preoccupied with quoting selected factual findings, or portions thereof, made by the Board's Trial Examiner in his Intermediate Report (appearing in its entirety at Pet. App. C 22-267), ignoring for the most part the legal principles for which the case stands. Indeed, the major argument it has elected to present in opposition to review of the central holding in this case is purely factual in character. It contends here, as it did in the court below, that the Company did not possess a genuine desire to enter into an agreement (U. Br. 13-16).

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[4] The use of the word "predetermined" in this context is misleading since the Trial Examiner expressly found that the Company's overall offer was not finally decided upon until several days before it was presented. This was some six weeks after negotiations began (Pet. App. C 81 and n. 23).

For the Union to challenge this long-decided factual issue or any other in this forum is not only inappropriate and impermissible but serves only to divert attention from the important legal principles involved. Petitioner herein is not seeking a review which would require this Court to make an assessment of the record evidence under the doctrine of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). The questions posed by it for review relate solely to the settlement of legal principles and standards governing the basic nature of the duty to bargain under the Act.

As far as the Company's desire to reach agreement is concerned, the Union's effort to deny its existence is futile. The Board's own brief in opposition to this Petition contains an admission (quoted at page 3 *supra*) of Company willingness to make an agreement, and an actual concession of desire to do so was made by the Board's General Counsel at the hearing in the following exchange (Tr. 276-77):

> "Mr. Benetar: May I ask from the Trial Examiner if the allegation of bad faith here does not go to the desire of the company to reach agreement, but as to the method it pursued in reaching it?
>
> "Mr. Richman [Counsel for the General Counsel]: Exactly."

See Intermediate Report of Trial Examiner Pet. App. C 207; see also Pet. App. C 3-5, 18-19.

C. The Significance of This Case

Whatever specific findings of refusal to bargain in specific instances may have been made in this case, the lead opinion below leaves no room for doubt that the rule of law which it sees as governing this case is:

> "We hold that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken." Pet. App. A 53.[5]

That opinion made this controlling quality explicitly clear when, after enunciating the rule just quoted, it added (*ibid.*):

> " . . . . It is this specific conduct that GE must avoid in order to comply with the Board's order, and *not* a carbon copy of *every underlying event relied upon by the Board to support its findings . . . .* " (Italics ours.)

The statement of this Court in *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (1923), quoted in *N.L.R.B.* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 503 (1951) (cited by Respondent-Union), that certiorari is granted "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," seems directly pertinent here. There is hardly a case in recent years in the area of labor-management relations which has stirred such widespread public comment and interest as that which is before this Court on the instant Petition. Appendix "A", attached hereto, lists a sampling of the news items and editorial comments which the Board's decision herein evoked and which appeared

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[5] Even the Board's brief in opposition to this Petition recognizes that significant changes in the Company's offer were made, thereby revealing the emotional rather than factual quality of the label "take-it-or-leave-it." Thus, in its brief (page 15) it refers to the Company's "*first* change of any *significance* in its offer of August 30." (Italics ours.) See also in this connection dissenting opinion by Friendly, J. Pet. App. A 65-66.

within the short space of approximately five weeks from the announcement of the decision. In professional journals as well, as noted in our Petition (12 n. 9), discussion of this case and of its implications was rife. We list in Appendix "B" hereto many of the legal periodicals in which the case has been analyzed and discussed. Some pertinent illustrative excerpts from these articles on the novelty and importance of the questions involved are also contained therein. In addition to the foregoing, the Labor Board decision and Trial Examiner's Intermediate Report have been included in the two leading law school case books on labor law. Cox & Bok, Labor Law 430 (Seventh Edition); Summers & Wellington, Labor Law—Cases and Materials 606 (1968).

No case of overall bad faith which turned entirely upon a particular and peculiar set of facts governed by undisputed legal principles would or could, we submit, have so roused the lay and professional community as did this one. The very intensity of the response to the publication of the decision puts at rest once and for all the attempt to mask or present this case as a run-of-the-mill decision.

CONCLUSION

For these reasons and those set forth in the Petition therefor, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX "A"

News and Editorial Comments

1. Washington Post, Dec. 26, 1964, "Good Faith Bargaining."

2. New York Journal-American, Dec. 31, 1964, *"These Days:* And Now: Trial By Mind Readers? by John Chamberlain."

3. Wall Street Journal, Dec. 22, 1964, "Review and Outlook—Ruling Out Bargaining."

4. St. Louis Globe Democrat, Dec. 21, 1964, "NLRB's Arbitrary Censorship."

5. The Boston Herald, "Judging 'Good Faith'."

6. Evening-Eagle Tribune, Lawrence, Mass., Dec. 23, 1964, "Unreasonable Decision."

7. Dallas Morning News, "At Random—Order to the Boss: Shut Up!"

8. Milwaukee Sentinel, Dec. 21, 1964, "NLRB Logic."

9. Tulsa Tribune, Dec. 17, 1964, "Gagging the Boss."

10. Detroit Free Press, Dec. 18, 1964, "Playing Free with the First."

11. The Iron Age, Dec. 24, 1964, "NLRB Ruling: Pay Now—Keep Quiet Later."

12. Newsweek, Jan. 4, 1965, "Abridging Free Speech by Henry Hazlitt."

13. New York World Telegram, Dec. 18, 1964, "The GE Case."

14. The Miami Herald, Jan. 4, 1965, " 'Unfair' For Employe To Hear An Offer? by James J. Kilpatrick."

15. Danville Commercial News, "Editor's Notebook—Labor Relations Board Decision Alarms Many."

16. New York World Telegram, Dec. 28, 1964, "Bill of Rights Denied, by Lawrence Fertig."

17. Arizona Daily Star, "A Superior Legal Status For Unions."

18. The Milwaukee Journal, "Doubtful Labor Decision."

19. Jefferson City Post-Tribune, "Free Speech for Some."

20. (Portland) Oregon Journal, "Rulings On Labor-Management Relations Reveal New Trend."

21. (Spokane) Spokesman-Review, "Labor Board Ruling Has Unfair Curb."

22. Caldwell (Idaho) News Tribune, "A Loud 'Phooey'!"

23. Bellingham (Wash.) Herald, "Time for a Look at NLRB Powers and Policies."

24. Human Events, Jan. 2, 1965, "Free Speech at Issue —NLRB Strikes Down 'Boulwarism' by Donald I. Rogers."

25. New York Times, Dec. 18, 1964, "A Tough Week For Management By Arthur Krock."

26. St. Petersburg Times, Dec. 18, 1964, " 'Good Faith' And Free Speech."

27. Long Beach Independent, "A Cause For Concern."

28. Rockford Morning Star, Dec. 23, 1964, "NLRB Ruling Is One-Sided."

29. Baltimore Sun, "How to Bargain."

30. Chicago Tribune, Dec. 18, 1964, "Freedom of Speech For Employers."

31. Albany Knickerbocker News, Dec. 17, 1964, "IUE Leader Assails Union For NLRB Ruling on GE."

32. Detroit News, Dec. 21, 1964, "NLRB on Bargaining 'Rights'—What's Good For One . . ."

APPENDIX "B"

Legal Periodicals

1. Cooper, *Boulwareism and the Duty to Bargain In Good Faith,* 20 Rutgers L. Rev. 653, 673 (1966):

> ". . . However, the Board did not limit itself to this function in the *GE* case; it applied a different standard to GE's conduct from any which it had previously used. . . . The Board's opinion in the *General Electric* case may be a considerable departure from previous case law. . . ."

2. Forkosch, *"Take It Or Leave It" As A Bargaining Technique,* 3 Calif. W.L. Rev. 43, 62:

> "This decision therefore presents a most important question for labor-management relations in bargaining. . . ."

3. Comment, *General Electric's Firm Offer Approach Bad Faith,* 40 N.Y.U.L. Rev. 798, 799, 800 (1965):

> "Because of the language of the majority opinion, however, there is serious doubt that the Board's holding was so conventional. . . . The implication of these broad statements may well presage a major realignment in the Board's approach to the bargaining obligation. . . .
>
> "If these possibilities reflect accurately the new position of the Board, the Board appears to have strayed from the language and policy of the NLRA. . . ."

4. Adams & Coleman, *Can Collective Bargaining Survive the Board?*, 52 Geo. L.J. 366, 373, 376 (1964):

> "But there is increasing evidence that the Board, particularly at the trial examiner level, is ignoring the statutory restrictions and the Supreme Court's admonitions. The recent report by the trial examiner in the *General Elec.* case is a classic case in point. . . .
>
> "The Board's recent decisions present several serious questions for the future of collective bargaining. What has become of the Supreme Court's view that an employer (or union) need *not* 'engage in fruitless marathon discussions at the expense of frank statement and support' of his position? What has become of the statutory right in good faith to withhold agreement and to decline concessions?"

5. Case Note, 1965 Duke L.J. 661, 665-66:

> "Although the Board expressly disclaimed any intention to freeze methods of collective bargaining into an inflexible mold, arguably it has done just that. . . ."

6. Maxwell, *The Duty to Bargain in Good Faith, Boulwareism And a Proposal—The Ascendance of the Rule of Reasonableness*, 71 Dick. L. Rev. 531, 550, 558 (1967):

> "In destroying the GE bargaining method under its Boulwareism approach, the Board may have frozen methods of collective bargaining into an inflexible mold . . . .
>
> "While the effects of the *GE* decision will be felt most strongly at GE, it will certainly make an impression on the whole of modern management."

7. Case Note, 63 Mich. L. Rev. 1473, 1479 (1965):

"... However, the majority opinion of the Board seems to transcend even the flexible standard of the traditional good faith requirement and to condemn Boulwareism totally."

8. Case Note, 43 Texas L. Rev. 974, 977-78 (1965):

"The Board, declaring General Electric's conduct violative of Section 8(a)(5), significantly narrowed the scope of a party's privilege to make no concession. . . .

[And on GE's publicity campaign]

"The Board apparently did not deem significant section 8(c) . . . ."

9. BNA "Labor Relations Reporter," November 3, 1969, 72 Analysis 37:

"The General Electric case was the first, however, in which the National Labor Relations Board sought to deal with an entire approach to bargaining."

10. Booker & Coe, *The NLRB and its Critics,* 17 L.L.J. 522 (1966).

11. Duvin, *The Duty To Bargain: Law In Search of Policy,* 64 Colum. L. Rev. 248 (1964).

12. Kirby, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining,* 63 Nw. U. L. Rev. 40 (1968).

13. Kuelthan, *The NLRB and the Duty to Make Concessions in Bargaining,* 18 L.L.J. 201 (1967).

14. Wellington, *Freedom of Contract and the Collective Bargaining Agreement,* 112 U. Penna. L. Rev. 467 (1964).

15. Comment, *Employer's Statutory Duty To Bargain,* 32 Fordham L. Rev. 557, 571 (1965).

16. *Recent Decision,* 38 Temp. L.Q. 353 (1965).

17. Case Note, 53 Geo. L.J. 115 (1965).

18. Case Note, 6 B.C. Ind. & Com. L. Rev. 949 (1965).

19. Case Note, 76 Harv. L. Rev. 807 (1963).

20. *Recent Developments,* 38 Wisc. B. Bull. 8 (1965).

21. A.B.A. Rep., *Section of Labor Relations Law* 150 (1965).